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STATE WATER RESOURCES CONTROL BOARD

IN RE: ORDER, ADOPTED FEBRUARY 8, 2006, ISSUED BY CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LAHONTAN REGION, REGARDING 474-585 COMMERCIAL ROAD, SUSANVILLE, CA (SLIC #T6S007)	)	No. _____ PETITION FOR REVIEW AND STAY

Pursuant to Water Code ' 13320 and ' 13321 and 23 C.C.R. ' 2050 and ' 2053 , Petitioner Washoe Fuel, Inc., dba Allied Washoe, a Nevada corporation authorized to do business in California, respectfully submits this Petition for Review and Stay of the Order ("Order"), No. R6T-1994-023A3, of the California Regional Water Quality Control Board, Lahontan Region ("Regional Board"), adopted February 8, 2006. A copy of the Order is attached hereto as Exhibit A. This is the third amendment to an original order adopted and issued in 1994, following a discharge in September, 1993, due to a mistaken delivery of gasoline, through no fault or involvement of the Petitioner, to Allied Washoe's property in Susanville. A more detailed description of the discharge follows.

The present Order concerns property at 474-585 Commercial Road,

Susanville, California, given the identification number SLIC#T6S007 by the Regional Board (the ASite@).

The Order was issued by vote of the Regional Board pursuant to authority allegedly found in California Water Code ' 13267 and ' 13304. It identified the Petitioner, along with two other parties, Atlas Bulk Carriers, which also may be known as Atlas Bulk, Inc. (AAtlas@), and Northland Transportation which also may be known as Northland Transportation, Inc. (ANorthland@), as the parties legally responsible for the Site, referred to as the AFormer Allied Petroleum Bulk Plant.@ It was found in the Order that there is the potential for groundwater contamination from the Site to migrate downward through subsurface vertical pathways from the shallow depths to the area=s main aquifer, which is located beneath a confining layer, and thereby threaten a municipal water supply well known as ASusanville Well No. 3.@

The Regional Board ordered Petitioner, Atlas and Northland to do the following, as set forth in more detail in the Order:

(1) Prevent Waste Discharge.

(2) Continue Groundwater Monitoring and Reporting.

(3) Implement the Remedial Action Plan, as Modified.

(4) [Assure] Compliance.

(5) Conduct Work Under Direction of [a] Licensed Geologist or Engineer.

(6) [Implement a] Summary of Ordered Tasks.

The Petitioner, in previous petitions for review in this matter, has stated in detail the background facts on this Site. Those petitions, however, have been held in abeyance as the Petitioner has done its best to cooperate with Regional Board and staff

requirements at the Site. A summary statement of those background facts is attached to this petition as part of Exhibit B, as an offer of proof.

There is no dispute that, in fact, Petitioner had nothing to do with the original discharge of gasoline containing MTBE in 1993. That gasoline, which belonged to the Leo S. Jones Oil Company, Inc. to be delivered to the Jones facility in Susanville, was wrongfully dumped in the middle of the night at the Site by Atlas's driver, under mistaken directions/delivery instructions by Northland. Findings of the Regional Board make this very clear, in the original order, No. 6-94-023 (dated March 3, 1994), the first amended order, No. 6-94-023A1 (dated June 5, 1998), and the second amended order, No. 6-94-023A2 (dated March 15, 1999). Understandably, not all the findings in the original order and first two Amended orders are included verbatim, but are only incorporated by reference, in the present Order. However, it is important to a full understanding of the case to see the incorporated findings in context. Consequently, Petitioner's counsel has prepared an annotated copy of the present Order, which includes findings from the earlier orders along with comments by counsel. The annotated copy of the present Order is attached hereto as part of Exhibit B.

The time has long since passed for this matter to be at an end for Petitioner. This Petitioner was in no way responsible for the actions that led to the discharge which has caused the various orders issued in regard to the Site. Yet the Petitioner has faithfully cooperated with the Regional Board to respond for the past twelve and one-half years.

Petitioner has been named in the Order and past orders solely because it was and is the owner of the property. Ordering the Petitioner now to take any further

action in this matter goes beyond the bounds of equity and fairness, not to mention authority established in the law.

In particular, the Regional Board, in item number (3) of the Order, requires the Petitioner to implement a Amodified@ Remedial Action Plan. Specifically, this requirement calls for excavation of an unknown amount of soil at a cost that is virtually impossible to calculate at this time, without any firm assurance that the situation at the site will be improved by this action from what it was when Petitioner previously excavated and disposed of 4,400 cubic yards of contaminated soil, in October, 2000, as required by the Regional Board pursuant to the second amended order.

Based on advice from its consultants, Petitioner submits that the modified Remedial Action Plan is not necessary to protect beneficial uses of the waters of the state, specifically the continued use of City of Susanville Well No. 3. In a letter dated January 25, 2006, signed under penalty of perjury, McGinley & Associates set forth the bases for questioning the need to conduct additional remediation activities at the site at this time. A copy of that letter is attached to this petition as Exhibit C.

Also in support of the position that the modified Remedial Action Plan is not necessary is a declaration dated March 9, 2006, also signed under penalty of perjury, by Dr. Robert J. Sterrett, Ph.D., R.G. A copy of Dr. Sterrett=s declaration is attached to this petition as Exhibit D. In summary, Dr. Sterrett=s opinions, without limitation, include the following:

> A1) ...[W]ater quality data ... collected from 2002 to ... 2005 ... do not indicate that MTBE has or is migrating to the Susanville Well #3 under current hydraulic stresses due to pumping from Well #3.@
>
> A2) ... [T]he lateral and vertical distributions of petroleum hydrocarbon constituents and MTBE have stabilized ... since the

spill occurred in 1993.@

A3) ... [T]he RWQCB ordered soil removal action is not technically necessary or cost effective ....@

A4) ... If the City of Susanville requires additional water supplies a cost analysis should be undertaken to determine if there is an alternat[ive to] ... the excavation and treatment of hydrocarbon-impacted soil at the former Allied Petroleum Bulk Plant.@

Dr. Sterrett recommends a modified plan of monitoring, along with possible analysis and consideration of relocating the municipal well, if more supplies are needed in the future, as a more logical and cost effective approach.

PETITION FOR REVIEW BY THE STATE BOARD

Pursuant to 23 C.C.R. ' 2050(a), a Petition for Review is required to contain enumerated items of information. Responses to each of those items are set forth below.

1. Name and Address of Petitioner

Petitioner is Washoe Fuel, Inc., dba Allied Washoe, a Nevada corporation authorized to do business in California, and its address is P.O. Box 6930, Reno, NV 89513. Petitioner may be contacted through its legal counsel at the address and phone number listed on the first page of this Petition.

2. The Specific Actions of the Regional Board which the State Board is Requested to Review

The State Water Resources Control Board ("State Board") is respectfully requested to review:

(a) the Regional Board=s naming of Petitioner, solely because of its ownership of the Site, as a responsible party and requiring of Petitioner, again solely because of its ownership of the Site, to take the actions identified above in the Order under Section

13267 of the California Water Code without identification of any evidence, other than property ownership, supporting naming Petitioner (as opposed to other responsible parties), when the Regional Board is fully aware that Petitioner has not discharged, is not discharging, is not suspected of having discharged or of discharging, nor has ever proposed to discharge any waste at the Site, and when such facts are a legal prerequisite to requiring a person to act under Section 13267 (b)(1);

(b) the Regional Board=s naming of Petitioner, solely because of its ownership of the Site, as a responsible party and requiring of Petitioner, again solely because of its ownership of the Site, to take the actions identified above in the Order under Section 13304 of the California Water Code, when the Regional Board is fully aware that Petitioner has not discharged, is not discharging, has not caused or permitted, and is not currently causing or permitting, the discharge of any waste at the Site, and when such facts are a legal prerequisite under law to require a person to act under Section 13304(a);

(c) the Regional Board's failure to name Petitioner secondarily, instead of primarily, responsible for investigation and cleanup of the Site;

(d) the Regional Board's failure to identify as primarily responsible parties at the Site the trucking companies, Northland and Atlas, directly responsible for the discharge that is the source of the contamination threatening Susanville Well #3, which is the subject of the Order;

(e) the Regional Board=s failure to properly follow the requirements of State Board Resolution 92-49 in issuing the Order;

(f) the Regional Board's schedule for actions required under the Order;

(g) all other provisions of the Order that may be unreasonable, arbitrary and capricious or otherwise not in accordance with the law based on the record in this case.

3. Date of the Action

February 8, 2006.

4. Reasons the Regional Board's Actions were Improper and Inappropriate

Petitioner believes the Order is improper and inappropriate because it purports to order the Petitioner to prepare and submit a plan and reports and take other specified action without the requisite legal authority on the record. Yet the Petitioner is a party that never discharged, proposed to discharge nor is suspected of having discharged a waste. The Order fails to identify the evidence that supports requiring the Petitioner to carry out the actions ordered, fails to allocate primary and secondary responsibility for compliance at the Site, fails to name as primarily responsible the trucking companies actually responsible for the discharge at the Site, fails to make findings needed to establish it has followed the requirements of Resolution 92-49, requires actions to be completed by the Petitioner upon a schedule that may be unreasonable, and includes other provisions which may be found to be unreasonable, arbitrary and capricious or not in accordance with the law based on the record in this case. The facts of this case are without precedent in terms of the non-involvement of the Petitioner in the discharge and in terms of the extraordinary efforts of the Petitioner to cooperate and assist in investigation and remediation from September, 1993, to the present.

5. Manner in Which Petitioner is Aggrieved

Despite the fact that it is merely the owner of the property, and was only the owner at the time of the discharge at its property by third parties not connected with

Petitioner, and despite the fact that there is no evidence any discharges were the responsibility of Petitioner, Petitioner will be required to incur additional hundreds of thousands of dollars, if not over $1 million, of expense in carrying out the work stated in the order and in previous orders. This is on top of expenditures of over $1.5 million that have already been made, primarily by the Petitioner, the Petitioner's insurer and by a group of settling parties put together only through the strong efforts and a lawsuit filed by the Petitioner. Continuing Petitioner's status as a primarily responsible liable party will assure that Petitioner will continue to have to fund very possibly all of the costs that are required to implement the Order and previous orders at the property, or else face the threat of imposition of unjustifiable fines and penalties. Failure to name the trucking companies and other potentially responsible parties as primarily responsible makes it less likely that they will share in any way in the implementation costs. Failure to analyze facts and make findings following the requirements of Resolution 92-49 makes it more likely that the Petitioner will be required to carry out actions that will not be technologically or cost effective and with the result that the public interest will not be maximized, as required by the Water Code.

6. Specific Action Requested of the State Board

Petitioner respectfully requests that the State Board direct the Regional Board to withdraw the present Order, conduct such factual investigations and analyses as necessary, make required findings and issue a revised order correcting the deficiencies identified in this petition.

Specifically, Petitioner respectfully requests that the Regional Board be directed to issue a revised order which does not include Petitioner in carrying out any

further investigation or remediation at the Site. Petitioner will continue to cooperate with the Regional Board in providing properly requested information and access.

Petitioner further respectfully requests specifically that the State Board direct the Regional Board to name the trucking companies as primarily responsible.

Petitioner further respectfully requests specifically that the State Board direct the Regional Board to fully comply with Resolution 92-49, by conducting such factual investigations and analyses necessary, making required findings and issuing a revised order.

7. Statement of Points and Authorities

It is a fundamental principle that to be required to provide reports under ' 13267 of the Water Code, a person must be a discharger. In the Matter of the Petition of Pacific Lumber Company and Scotia Pacific Company LLC, Order No. WQ 2001-14 (2001), page 10: (AIn reviewing a water quality monitoring and reporting order entered by a Regional Water Quality Control board pursuant to section 13267, the SWRCB first must determine if the party to whom the monitoring order is directed has discharged, is discharging, is suspected of discharging, or proposed to discharge waste.@). There is nothing in the Order about Allied discharging waste. There is no identification of the evidence supporting requiring Allied to provide the reports, other than it is the property owner and corporate successor to the property owner. Thus, the Regional Board has only gone half way in fulfilling the requirements of the last sentence of ' 13267(b)(1):

> AIn requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.@ (Emphasis added.)

The State Board has recognized that it is important for orders to explain

the basis for naming persons under ' 13267 and ' 13304. See, e.g., In the Matter of the Petition of Mr. Kelly Engineer/All Star Gasoline, Inc., Order No. WQO - 2002-0001 (2002) page 4, citing, among others, to In the Matter of the Petition of Las Virgenes Municipal Water District, et al., Order No. WQ 2001-03, at p. 4, fn 8 (AA regional board must make findings that >bridge the analytic gap between raw evidence and ultimate decision or order.=@ Further citations omitted.)

It is Petitioner=s position that, both in law and equity, it should have no further responsibility for investigation and cleanup at the Site. However, it is also true that Petitioner believes the Regional Board should have named Petitioner, if at all, as only secondarily responsible. Decisions of the State Water Resources Control Board have established that it is appropriate to allocate cleanup responsibility primarily to the discharger(s) who directly caused discharges, and secondarily to the owner of the property who is responsible for the contamination solely because it may be held to have "caused or permitted" the discharge through its ownership of the property in question. Under this allocation system, in proper cases, the landowner is responsible to comply with the Order only upon receiving notice that the primarily responsible operator or other dischargers have failed to do so.

The following State Board decisions, and others, have elucidated this principle: In the Matter of the Petition of Vallco Park, Ltd., Order No. WQ 86-18 (1986) (tenant operator primarily responsible for cleanup; landowner responsible only in event tenant fails to comply with orders); In the Matter of the Petition of Prudential Insurance Company of America, Order No. WQ 87-6 (1987) (landowner secondarily responsible where it did not initiate or contribute to the discharge; order amended so that tenant

operator is required to meet compliance deadlines while landowner is responsible for compliance only upon tenant's failure to comply); In the Matter of the Petition of Schmidl, Order No. WQ 89-1 (1989) (landowner responsible to comply with order only following 60 days' notice that tenant operator has failed to do so); In the Matter of the Petition of Spitzer, Order No. WQ 89-8 (1989) (landowner secondarily responsible); In the Matter of the Petition of Wenwest, Order No. WQ 92-13 (1992) (landowner secondarily responsible for cleaning up discharge which it neither caused nor permitted).

However, where the connection of a property owner to a discharge is so tenuous as to have no causal relation to a discharge, it is highly questionable whether a mere property owner can be found to be covered legally by the provisions of Water Code § 13304(a). *City of Modesto Redevelopment Agency v. Superior Court* (2004), 119 Cal. App. 4th 28 at 44 ("… [W]e see no indication the Legislature intended the words 'causes or permits' within the Porter-Cologne Act to encompass those whose involvement with a spill was remote or passive."). This is the situation in the present case.

Likewise, the principle is clear in the Water Code that the burden of requiring reports must be fairly shared and must be related to the benefits to be obtained from the reports. Water Code ' 13267 (b)(1). In the Matter of the Petition of HR Textron, Inc., Order No. WQ 94-2 (1994) (Regional Board is authorized to require reports, however, the burden of such reports must bear a reasonable relationship to the need for and the benefits to be obtained from the reports).

It is also a precedent in matters of this type that, as was stated in In re the Petition of Exxon Company, U.S.A., Order No. WQ 85-7, at 11 (1985), Ait is appropriate and reasonable for a Regional Water Board to name all parties for which there is

reasonable evidence of responsibility, even in cases of disputed responsibility.@

Finally, it is clear that Regional Boards are required to follow the provisions of Resolution 92-49 in arriving at Orders such as that in the present case. Consistent with the Antidegradation Policy and Chapter 15 regulations, the "Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304" set forth in Resolution No. 92-49 ("Cleanup Policies and Procedures"), as amended, require a balancing of interests, and this balancing was not conducted by the Regional Board. Paragraph III.G. of the Cleanup Policies and Procedures states, in pertinent part:

> "… [D]ischargers are required to cleanup and abate the effects of discharges in a manner that promotes attainment of background water quality, or the highest water quality which is reasonable if background levels of water quality cannot be restored, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Underlining added for emphasis.)

This language comes directly out of Water Code § 13000, which sets forth the basic legislative findings and declarations on these subjects:

> "… [A]ctivities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality that is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Underlining added for emphasis.)

No findings appear in the Order on these subjects, especially the reasonableness of the action, the economic factors, etc. It is not reasonable to require most of the actions in the Order.

Paragraph 9. of the recitals of the Cleanup Policies and Procedures states: "… [T]he Regional Board may require dischargers … to furnish … reports …, provided

that the burden, including costs, of these reports, shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports …. " Paragraph III. B. of the Cleanup Policies and Procedures states that a Regional Board is required to "[c]onsider whether the burden, including costs, of reports required of the discharger during the investigation and cleanup and abatement of a discharge bears a reasonable relationship to the need for the reports and the benefits to be obtained from the reports …." There are no findings contained in the Order addressing the burden or the cost of the reports or analyzing the reasonable relationship of need and benefits.

As a result of these shortcomings, the Order is legally deficient.

8. List of Persons Known to Have an Interest in This Petition

Petitioner is attempting to develop and will request that the Regional Board provide a list of persons known by the Regional Board to have an interest in the subject matter of this Petition. Petitioner will provide the Regional Board's list of such persons to the State Board as an amendment to this Petition.

In addition to any persons identified by the Regional Board pursuant to the above request, the parties listed above in this petition may have an interest in the subject matter of this Petition, and Petitioner is diligently collecting the information on those parties that may be available and will submit it as an amendment to this petition. The names and addresses available to Petitioner are as follows:

James Bolla
Atlas Bulk Carriers
P.O. Box 227
Paramount, CA 90723

Roy S. Bumgarner
Northland Transportation, Inc.
c/o John Jeffrey Carter, Esq.
Carter, Trover Law Offices
P.O. Box 3606
Chico, CA 95927-3606

Leo S. Jones Petroleum Company, Inc.
c/o Rusty Rinehart, Esq.
200 South Santa Cruz Avenue
Suite 101-C
Los Gatos, CA 95030

9. Sending Copies of this Petition

Petitioner is sending copies of this Petition to the Regional Board, and to the parties listed in the preceding paragraph, to the extent it has addresses for those parties.

10. Request for Preparation of Regional Board Record

A copy of the request of Petitioner for preparation of the Regional Board record, including available tape recordings or transcripts, if any, will be included as an attachment to this Petition.

PETITION FOR PARTIAL STAY BY THE STATE BOARD

Washoe Fuel, Inc., hereby petitions the State Board for a stay of the Regional Board=s Order, especially the requirement to implement the modified Remedial Action Plan calling for planning for soil excavation and for actual excavation of soil to begin by June, 2006, and be completed by September, 2006, respectively, and any associated activities called for under the Order, including but not limited to the scheduling dates for these activities set forth in the Order.

Pursuant to 23 C.C.R. ' 2053(a), a Petition for Stay is required to contain allegations and proof of three items. Allegations and showings as to each of those items

are set forth below.

1. Substantial Harm to Petitioner or to the Public Interest if a Stay is Not Granted

The Petitioner will be required to incur costs estimated to be at least $500,000 and possibly over $1 million, if the amended Remedial Action Plan adopted by the Regional Board is carried out by the Petitioner (Declaration of Tracy Johnston, dated March 9, 2006, Exhibit E, page 2.). Incurring these costs, is not necessary at this time (MGA letter declaration, dated January 25, 2006, Exhibit C, page 2.). The analytical results show contaminant concentrations, between the point of release and Well No. 3, appear to be decreasing (MGA letter declaration, dated January 25, 2006, Exhibit C, page 1, item 1.), additional monitoring may provide information to support forgoing additional remediation action (MGA letter declaration, dated January 25, 2006, Exhibit C, page 2, item 1.), groundwater monitoring data suggest that the dissolved product plume is relatively stable at this time (MGA letter declaration, dated January 25, 2006, Exhibit C, page 2, item 2.), lateral and vertical distributions of petroleum hydrocarbon constituents and MTBE have stabilized (Declaration of Dr. Robert J. Sterrett, dated March 9, 2006, Exhibit D, page 2, item 2.), and there is no evidence to suggest that a substantial mass of contaminants is migrating into that portion of the aquifer from which drinking water is withdrawn (MGA letter declaration, dated January 25, 2006, Exhibit C, page 2, item 3.). Moreover, the soil removal action ordered by the Regional Board is not technically necessary or cost effective (Declaration of Dr. Robert J. Sterrett, dated March 9, 2006, Exhibit D, page 2, item 3.), and a more logical and cost effective alternative exists (Declaration of Dr. Robert J. Sterrett, dated March 9, 2006, Exhibit D, page 3, item 3.). A cost analysis of re-locating City Well No. 3 should be conducted (Declaration of Dr.

Robert J. Sterrett, dated March 9, 2006, Exhibit D, page 3, item 4.). No such analysis and comparison has been conducted by the Regional Board (Total absence of any such analysis in the record). Consequently, the expenditure will be a waste of valuable resources, substantially harmful to the Petitioner, if it has to pay, and substantially harmful to and against the public interest, regardless of who pays. This certainly so if, for any reason, public funds must be used.

2. Lack of Substantial Harm to Other Interested Persons and to the Public Interest if a Stay is Granted

Neither public nor private interests will be substantially harmed or adversely impacted by a stay. It does not appear that the release of petroleum and MTBE has detrimentally impacted beneficial use of Susanville Well No. 3 (MGA letter declaration, dated January 25, 2006, Exhibit C, pages 1- 2, item 1.), and there is no evidence to suggest that the beneficial use of Well No. 3 will be impacted necessarily in the future (MGA letter declaration, dated January 25, 2006, Exhibit C, page 2, item 1.) Water quality data collected from 2002 through 2005 do not indicate MTBE has been or is migrating to Well No. 3 due to pumping from Well No. 3 (Declaration of Dr. Robert J. Sterrett, dated March 9, 2006, Exhibit D, page 2, item 1.). None of the drinking water wells in the vicinity of the Site have exceeded MCLs (MGA letter declaration, dated January 25, 2006, Exhibit C, page 2, item 4.). Nevertheless, years ago, the Petitioner offered to connect all (Matter of public record), and, in fact, successfully connected nearly all the surrounding properties= domestic supplies to the City water supply, and all those being used (MGA letter declaration, dated January 25, 2006, Exhibit C, page 2, item 4.) It does not appear that any active domestic wells that may be currently used for drinking water have been impacted by the release (MGA letter declaration, dated January

25, 2006, Exhibit C, page 2, item 4.). Continued monitoring is suggested (Declaration of Dr. Robert J. Sterrett, dated March 9, 2006, Exhibit D, page 3, item 3.), and if there is a change in operation of Well No. 3, the monitoring frequency can be altered (Declaration of Dr. Robert J. Sterrett, dated March 9, 2006, Exhibit D, page 3, item 3.).

3. Substantial Questions of Fact and Law Regarding the Disputed Action

The legal arguments made above in this petition are incorporated here by reference.

Required findings were not made to support the Order, especially those portions requiring the implementation of the modified Remedial Action Plan.

Moreover, there are not sufficient facts establishing the Petitioner's involvement with the Site to establish that Petitioner should be classified as a discharger under § 13267 and § 13304 of the Water Code. *City of Modesto Redevelopment Agency v. Superior Court* (2004), 119 Cal. App. 4th 28 at 44.

REQUEST FOR HEARING BEFORE THE STATE BOARD

In accordance with 23 C.C.R. ' 2050(b) and ' 2053(a), respectively, Petitioner respectfully requests that the State Board hold a hearing to consider this Petition and to consider Petitioner=s request for a stay. Petitioner may present additional evidence that was not available to the Regional Board at the time the Order was issued or when this Petition was submitted. In addition, Petitioner requests permission at any hearing: (1) to present oral argument on the legal and policy issues raised by this Petition; and (2) to present to the State Board factual and technical information in the Regional Board's files which may have been overlooked by the Regional Board.

WHEREFORE, Petitioner respectfully requests action by the State Board as set forth above.

Date: March 10, 2006

Respectfully submitted,

LAW OFFICES OF KARL R. MORTHOLE

By **/s/ Karl R. Morthole** Karl R. Morthole
Attorney for Petitioner